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6 UNITED STATES DISTRICT COURT  
7 EASTERN DISTRICT OF WASHINGTON

8 PAMELA A. BAUGHER,

9 Plaintiff,

10 v.

11 CITY OF ELLENSBURG, WA,  
12 THE BROADWAY GROUP,

13 Defendants.

NO. CV-06-3026-RHW

**ORDER GRANTING THE  
BROADWAY GROUP'S  
MOTION FOR SUMMARY  
JUDGMENT; GRANTING THE  
CITY OF ELLENSBURG'S  
MOTION FOR SUMMARY  
JUDGMENT**

14 Before the Court is Defendants' Motions for Summary Judgment (Ct. Recs.  
15 25, 30). A hearing was held on the motions on February 20, 2007, in Yakima,  
16 Washington. Plaintiff participated *pro se* telephonically; Defendant City of  
17 Ellensburg was represented by Charles Zimmerman; Defendant The Broadway  
18 Group was represented by Raymond Schutts.

19 **BACKGROUND**

20 The following facts are viewed in the light most favorable to Plaintiff, the  
21 non-moving party.

22 Plaintiff routinely travels with her dog "Bun." Bun accompanies Plaintiff to  
23 assist her with alertness to the need for medication and alertness to surroundings.  
24 Plaintiff suffers from autism, panic attacks, a head injury, asthma and has hearing  
25 problems.

26 On June 17, 2005, Plaintiff was traveling with Bun from Seattle,  
27 Washington to Sunnyside, Washington on I-90, when she decided to stop at the  
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1 Flying J convenience store in Ellensburg, Washington. She entered the store with  
2 Bun in tow. As she neared the open deli case, a store clerk approached her,  
3 expressed concern that Bun was near the food, and asked if she could help Plaintiff  
4 retrieve any food items. She also asked Plaintiff to keep Bun away from the food.

5 Plaintiff told the store clerk that Bun was a service animal, and therefore,  
6 could remain in the store. Plaintiff informed the store personnel that the  
7 Americans with Disabilities Act (ADA) and the Washington Law Against  
8 Discrimination required access for medical service dogs. The store clerk and the  
9 store manager denied this right, asserting that company policy and health  
10 regulations prevented Bun from being near the deli case. Plaintiff asked that the  
11 police be called to enforce the Washington criminal statutes that make it a crime to  
12 deny access because of the use of a service dog and to separate a service dog from  
13 a user.

14 Plaintiff was asked to leave the store by the store manager. She refused.  
15 Eventually, the police were called. When they arrived, Plaintiff, the manager, and  
16 the police stepped outside the store. The police asked Plaintiff for her name and  
17 identification, which she refused to give. The police notified her that they were  
18 investigating her for criminal trespass. Plaintiff became angry and started to walk  
19 away. The police asked her to stay and she refused. Ultimately, two police  
20 officers grabbed Plaintiff and handcuffed her. One of the police officers removed  
21 Bun from Plaintiff's grasp. Once she was handcuffed, Plaintiff fell to the ground  
22 and started crying for help. She complained of chest pains, and she expressed  
23 concern that Bun was going to die, due to the heat. An ambulance was called to  
24 the scene, and Plaintiff was transported to the emergency room. One of the  
25 officers retrieved Plaintiff's medication from her purse, which was in the front seat  
26 of the car. While in the ambulance, Plaintiff refused all medical assistance, but  
27 continued to complain of chest pains. At the emergency room, she continued to  
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1 refuse all medical assistance. Eventually, she was released from the ER, and was  
 2 brought by the police to the Animal Shelter to retrieve Bun<sup>1</sup>, and then was returned  
 3 to the car.

4 As a result of this incident, Plaintiff is seeking two million dollars in  
 5 damages.

## 6 DISCUSSION

7 Plaintiff is proceeding *pro se*; thus, the Court will liberally construe her  
 8 pleadings. *Ortez v. Washington County*, 88 F.3d 804, 807 (9<sup>th</sup> Cir. 1996). It  
 9 appears that Plaintiff is making the following claims: (1) violation of the  
 10 Americans with Disabilities Act (ADA); (2) violation of the Washington Law  
 11 Against Discrimination, Wash, Rev. Code § 49.60; (3) violation of Wash. Rev.  
 12 Code §§ 9.91.170 and 70.84.070; (4) violation of 28 C.F.R. § 35.134; and (5)  
 13 section 1983 claim based on unreasonable search and seizure. Plaintiff's complaint  
 14 does not differentiate between the claims asserted against the two Defendants. The  
 15 Court construes Plaintiff's complaint as asserting the five claims against both  
 16 Defendants.

### 17 I. Standard of Review

18 Summary judgment is appropriate if the "pleadings, depositions, answers to  
 19 interrogatories, and admissions on file, together with the affidavits, if any, show  
 20 that there is no genuine issue as to any material fact and that the moving party is  
 21 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). There is no  
 22 genuine issue for trial unless there is sufficient evidence favoring the non-moving  
 23 party for a jury to return a verdict in that party's favor. *Anderson v. Liberty Lobby*,

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24 <sup>1</sup>After being taken from Plaintiff, Bun as placed in a patrol car. The officer  
 25 who placed Bun in the car testified that he made sure that Bun was in the shade, the  
 26 windows were rolled down and the air conditioning was running. Bun was then  
 27 transported to the nearest animal shelter.  
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1 *Inc.*, 477 U.S. 242, 250 (1986). The moving party had the initial burden of  
2 showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*,  
3 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-  
4 moving party must go beyond the pleadings and “set forth specific facts showing  
5 that there is a genuine issue for trial. *Id.* at 325; *Anderson*, 477 U.S. at 248.

6 In addition to showing that there are no questions of material fact, the  
7 moving party must also show that it is entitled to judgment as a matter of law.  
8 *Smith v. Univ. of Washington Law School*, 233 F.3d 1188, 1193 (9<sup>th</sup> Cir. 2000).  
9 The moving party is entitled to judgment as a matter of law when the non-moving  
10 party fails to make a sufficient showing on an essential element of a claim on  
11 which the non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323.

12 When considering a motion for summary judgment, a court may neither  
13 weigh the evidence nor assess credibility; instead, “the evidence of the non-movant  
14 is to be believed, and all justifiable inferences are to be drawn in his favor.”  
15 *Anderson*, 477 U.S. at 255.

## 16 **II. The Broadway Group’s Motion for Summary Judgment**

17 Defendant The Broadway Group argues that summary judgment is  
18 appropriate for all of Plaintiff’s claims asserted against it.

### 19 **(1) Americans with Disabilities (ADA) Claim**

20 Plaintiff is relying, in part, on the Americans with Disabilities Act in support  
21 of her claim for damages. Pursuant to Title III of the ADA, private entities, such as  
22 gas stations and establishments that sell food, cannot discriminate against  
23 individuals based on their disability. 42 U.S.C. § 12182(a). Monetary damages,  
24 however, are not recoverable under Title III of the ADA—only injunctive relief.  
25 *Wander v. Kaus*, 304 F.3d 856, 858 (9<sup>th</sup> Cir. 2002). Here, Plaintiff’s complaint is  
26 clear. She is seeking only monetary damages. Thus, summary judgment in favor  
27 of Defendant The Broadway Group with regard to Plaintiff’s ADA claim is  
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appropriate.

1           **(2) 28 C.F.R. § 35.134**

2           Plaintiff cites to 28 C.F.R. § 35.134 in support of her claim against  
3 Defendants. 28 C.F.R. § 35.134 prohibits retaliation or coercion on the part of  
4 state and local government services, which is part of Title II of the ADA.  
5 Specifically, it provides:

6           (a) No private or public entity shall discriminate against any  
7 individual because that individual has opposed any act or practice  
8 made unlawful by this part, or because that individual made a charge,  
9 testified, assisted, or participated in any manner in an investigation,  
10 proceeding, or hearing under the Act or this part.

11           (b) No private or public entity shall coerce, intimidate, threaten,  
12 or interfere with any individual in the exercise or enjoyment of, or on  
13 account of his or her having exercised or enjoyed, or on account of his  
14 or her having aided or encouraged any other individual in the exercise  
15 or enjoyment of, any right granted or protected by the Act or this part.  
16 28 C.F.R. § 35.134.

17           To the extent that the ADA applies to private entities, it is through Title III  
18 of the ADA. Thus, this C.F.R. section does not apply to Defendant The Broadway  
19 Group in this context.

20           Part 36 of Title 28 of the CFR, however, covers Nondiscrimination on the  
21 Basis of Disability by Public Accommodations and in Commercial Facilities. Part  
22 36 contains a similar provision that prohibits retaliation and coercion in public  
23 accommodations and in commercial facilities.

24           28 C.F.R. § 36.206 provides:

25           (a) No private or public entity shall discriminate against any  
26 individual because that individual has opposed any act or practice  
27 made unlawful by this part, or because that individual made a charge,  
28 testified, assisted, or participated in any manner in an investigation,  
proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten,  
or interfere with any individual in the exercise or enjoyment of, or on  
account of his or her having exercised or enjoyed, or on account of his  
or her having aided or encouraged any other individual in the exercise  
or enjoyment of, any right granted or protected by the Act or this part.

©) Illustrations of conduct prohibited by this section include,  
but are not limited to:

(1) Coercing an individual to deny or limit the benefits,  
services, or advantages to which he or she is entitled under the Act or  
this part;

(2) Threatening, intimidating, or interfering with an individual

1 with a disability who is seeking to obtain or use the goods, services,  
2 facilities, privileges, advantages, or accommodations of a public  
accommodation;

3 (3) Intimidating or threatening any person because that person  
is assisting or encouraging an individual or group entitled to claim the  
4 rights granted or protected by the Act or this part to exercise those  
rights; or

5 (4) Retaliating against any person because that person has  
participated in any investigation or action to enforce the Act or this  
part.

6 28 C.F.R. § 36.206.

7 This regulation is based on 42 U.S.C. § 12203(b), which provides:

8 It shall be unlawful to coerce, intimidate, threaten, or interfere  
9 with any individual in the exercise or enjoyment of, or on account of  
his or her having exercised or enjoyed, or on account of his or her  
10 having aided or encouraged any other individual in the exercise or  
enjoyment of, any right granted or protected by this chapter.  
42 U.S.C. § 12203(b).

11 Even if the Court were to liberally construe Plaintiff's complaint to allow  
12 her to state a claim under 42 U.S.C. § 12203(b) and 28 C.F.R. § 36.206, Plaintiff's  
13 retaliation claim does not survive because compensatory and punitive damages are  
14 not available for retaliation claims under the ADA. *See Kramer v. Banc of*  
15 *America Securities, L.L.C.*, 355 F.3d 961, 965 (7<sup>th</sup> Cir. 2004).

### 16 (3) Section 1983 Claim Based on the Fourth Amendment

17 Section 1983 creates a cause of action against any person who, acting under  
18 color of state law, violates the constitutional rights of another person. 42 U.S.C. §  
19 1983; *Mabe v. San Bernardino County, Dep't of Public Soc. Serv.*, 237 F.3d 1101,  
20 1106 (9<sup>th</sup> Cir. 2001). To succeed on a section 1983 claim, Plaintiff must show that  
21 (1) the conduct complained of was committed by a person acting under color of  
22 state law; and (2) the conduct deprived her of a constitutional right. *Long v.*  
23 *County of Los Angeles*, 442 F.3d 1178, 1185 (9<sup>th</sup> Cir. 2006).

24 Here, there is nothing in the record that would support a finding that the  
25 employees of The Broadway Group were acting under color of state law. Thus, to  
26 the extent Plaintiff is asserting a section 1983 claim against Defendant The  
27 Broadway Group, summary judgment is appropriate.

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1           **(4) Remaining State Law Claims**

2           Plaintiff alleges a number of state claims. Because the Court has granted  
3 summary judgment with respect to all federal claims, the Court declines to extend  
4 supplemental jurisdiction to the remaining state claims. *See* 28 U.S.C. § 1367©);  
5 *see also Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988) (“[I]n the  
6 usual case in which all federal-law claims are eliminated before trial, the balance of  
7 factors to be considered under the pendent jurisdiction doctrine—judicial  
8 economy, convenience, fairness, and comity—will point toward declining to  
9 exercise jurisdiction over the remaining state-law claims.”); *United Mine Workers*  
10 *of Am. v. Gibbs*, 383 U.S. 715, 726 (1966).

11           **III. Defendant City of Ellensburg**

12           **(1) Americans with Disabilities Claim (ADA)**

13           Title II of the ADA applies to any state or local government. 42 U.S.C. §  
14 12131. Title II authorizes suits by private citizens for money damages against  
15 public entities that violate § 12132. *See* 42 U.S.C. § 12133 (incorporating by  
16 reference 29 U.S.C. § 794a); *see United States v. Georgia*, 126 S.Ct. 877, 879  
17 (2006). Plaintiff cannot bring an ADA claim against the police officers in their  
18 individual capacity under Title II. *Alsbrook v. City of Maumelle*, 184 F.3d 999,  
19 1005 n.8 (8<sup>th</sup> Cir. 1999).

20           In order to state a claim of disability discrimination under Title II, Plaintiff  
21 must allege four elements: (1) she is an individual with a disability; (2) she was  
22 otherwise qualified to participate in or receive the benefit of some public entity's  
23 services, programs, or activities; (3) she was either excluded from participation in  
24 or denied the benefits of the public entity's services, programs, or activities, or was  
25 otherwise discriminated against by the public entity; and (4) such exclusion, denial  
26 of benefits, or discrimination was by reason of her disability. *McGary v. City of*  
27 *Portland*, 386 F.3d 1259, 1265 (9<sup>th</sup> Cir. 2004).



1 The Court liberally construes Plaintiff's complaint as bringing two claims  
2 under Title II: (1) the City of Ellensburg violated the ADA when it failed to  
3 enforce her right to bring a service dog into a public accommodation; and (2) the  
4 City of Ellensburg violated the ADA when its police officers arrested her on  
5 account of her disability.

6 Defendant City of Ellensburg does not dispute that Plaintiff may have a  
7 qualifying disability; rather, it argues that Plaintiff cannot establish a violation of  
8 the ADA because Bun does not qualify as a service animal, and because she was  
9 not discriminated against because she was disabled.

10 Pursuant to the ADA, a service animal is defined as:

11 Service animal means any guide dog, signal dog, or other  
12 animal individually trained to do work or perform tasks for the benefit  
13 of an individual with a disability, including, but not limited to,  
14 guiding individuals with impaired vision, alerting individuals with  
impaired hearing to intruders or sounds, providing minimal protection  
or rescue work, pulling a wheelchair, or fetching dropped items.  
28 C.F.R. § 36.104.

15 In support of their argument, Defendants rely on Washington case law, and a  
16 federal district court case, *Prindable v. Ass'n of Apartment Owners of 2987*  
17 *Kalakaua*, 304 F.Supp.2d 1245 (D. Haw. 2003). In that case, the district court held  
18 that there must be some evidence of individual training to set the service animal  
19 apart from the ordinary pet. *Id.* at 1256. Although the Ninth Circuit affirmed the  
20 granting of summary judgment in that case, it specifically declined to rule on  
21 whether the plaintiffs must prove that the dog is an individually trained service  
22 animal. *See DuBois v. Ass'n of Apartment Owners of 2987 Kalakaua*, 453 F.3d  
23 1175, 1179 n.2 (9<sup>th</sup> Cir. 2006) ([W]e need not and do not reach other issues  
24 addressed by the district court, including whether the plaintiffs must prove that [the  
25 dog] "is an individually trained service animal."). Moreover, in *Lentini v.*  
26 *California Center for the Arts, Escondido*, the Circuit concluded, without  
27 comment, that a small, black Shih Tzu/Poodle mix named Jazz, was a service  
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1 animal that provided minimal protection and retrieved small dropped items for a  
2 quadriplegic, who used a wheelchair for mobility. 370 F.3d 837, 839 (9<sup>th</sup> Cir.  
3 2004).

4 Defendants argue that personal training coupled with evidence of outside  
5 obedience training and actual observation of the animal exhibiting the learned  
6 behavior is required in order to qualify the animal as a service animal. The Court  
7 agrees that there must be some evidence to set a service animal apart from an  
8 ordinary pet, but disagrees that there must be documented evidence of individual  
9 training. In this case, the issue with regard to whether Bun is considered a “service  
10 animal” does not necessarily turn on documented evidence, but whether Bun was  
11 trained *to do work or perform tasks* for the benefit of an individual with a  
12 disability. Plaintiff asserts that the presence of Bun assisted her in her daily life.  
13 However, the record is devoid of any specific work or tasks that Bun was trained to  
14 perform for the benefit of Plaintiff, other than to be a presence that would remind  
15 Plaintiff to take her medication, or to stay focused.<sup>2</sup> Plaintiff asserts that Bun cued  
16 her to take her medicine. Plaintiff does not explain the specific cue that Bun was  
17 trained to provide when the need to take her medicine arose, nor is there anything  
18 in the record that explains the cues that Bun was trained to provide to Plaintiff to  
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20 <sup>2</sup>In opposition to Defendants’ motions, Plaintiff submitted a letter from Dr.  
21 Janet Arnold, dated March 30, 2004. In the letter, Dr. Arnold states that Plaintiff is  
22 her patient, and Plaintiff uses a medical service dog “Bun.” Dr. Arnold wrote that  
23 she has witnessed that Bun “cues” Plaintiff to take her prescribed medications for  
24 her asthma, emphysema and panic attack disorders. Pursuant to Fed. R. Civ. P.  
25 56(e), supporting affidavits shall be made on personal knowledge and shall set  
26 forth such facts as would be admissible in evidence. Dr. Arnold’s letter is not  
27 admissible because it is hearsay. Moreover, Dr. Arnold’s letter does not address  
28 how Bun was trained to provide these cues.

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1 keep her focused. Nor does Plaintiff explain how Bun was trained to provide these  
2 cues. The Court does not doubt that Bun provided Plaintiff with a sense of security  
3 and comfort and helped her cope with her disability, but this does not meet the  
4 statutory definition of a service animal, as defined by the ADA. The Court reads  
5 the regulation as requiring something more than merely being a presence that  
6 provides comfort, companionship, or interaction with an individual. The  
7 regulation is clear. The service dog must be trained to perform specific tasks or  
8 work and there is nothing in the record to suggest that Bun was trained to perform  
9 specific *tasks or work* for the benefit of Plaintiff. Plaintiff has not presented any  
10 admissible evidence that sets Bun apart from the ordinary pet.

11 Accordingly, Plaintiff has failed to show that Bun is a service dog as defined  
12 by the ADA. As such, the City of Ellensburg did not violate the ADA by failing to  
13 enforce her right to bring a service dog into a public entity because Bun was not a  
14 service animal as defined by the ADA. Additionally, the City of Ellensburg did  
15 not violate the ADA because its police officers did not arrested her on account of  
16 her disability, because she was not entitled to have Bun in the Flying J.

17 **(2) 28 C.F.R. § 35.134**

18 To the extent Plaintiff is asserting a retaliation claim against Defendant City  
19 of Ellensburg, her claim does not survive because compensatory and punitive  
20 damages are not available for retaliation claims under the ADA. *Kramer*, 355 F.3d  
21 at 965.

22 **(3) Section 1983 Claims Based on the Fourth Amendment**

23 Plaintiff is bringing her section 1983 claim against the City of Ellensburg  
24 only, and not against the individual officers. A municipality may be held liable  
25 under § 1983 only for constitutional violations occurring pursuant to an official  
26 government policy or custom. *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 691  
27 (1978). Plaintiff has not presented any evidence of any official government policy  
28 or custom that authorizes unlawful searches and arrests. *See Hart v. Parks*, 450

1 F.3d 1059, 1071 (9<sup>th</sup> Cir. 2006) (holding that dismissal of *Monell* claims were  
2 proper where police had probable cause to arrest and where plaintiff failed to  
3 provide any evidence showing that the police department had a policy or custom  
4 allowing unconstitutional arrests). Thus, summary judgment with respect to her  
5 section 1983 claim against the City of Ellensburg is appropriate.

6 **(4) Remaining State Claims**

7 For the reasons stated above, the Court declines to exercise supplemental  
8 jurisdiction over the remaining state claims.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant The Broadway Group's Motion for Summary Judgment (Ct.  
11 Rec. 25) is **GRANTED**.

12 2. Defendant City of Ellensburg's Motion for Summary Judgment (Ct.  
13 Rec. 30) is **GRANTED**.

14 **IT IS SO ORDERED.** The District Court Executive is directed to enter this  
15 Order, forward copies to Plaintiff and counsel, and close the file.

16 **DATED** this 19<sup>th</sup> day of March, 2007.

17 *S/ Robert H. Whaley*

18 **ROBERT H. WHALEY**  
19 Chief United States District Judge

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